STATE OF VERMONT
DEPARTMENT OF EDUCATION

SPECIAL EDUCATION)
Case No. DP07-03)

SUMMARY JUDGMENT ORDER

On March 2, 2007, the Educational Surrogate Parent ("ESP") for the student, filed a due process complaint seeking reimbursement for placement of the student at Project LEARN in Lyndonville for the 2006-2007 school year.

Respondent, Caledonia North Supervisory Union ("CNSU"), moved for summary judgment for dismissal based upon the 90 day statute of limitations in unilateral placement cases set forth in V.R.E. 2365.1.6.1(a)2.

In support of its Motion for Summary Judgment, CNSU has filed a Statement of Undisputed Material Facts, Affidavits, Exhibits, Supplemental Memorandum and Revised Statement of Undisputed Material Facts.

ESP has filed an Opposition to CNSU's Motion for Summary Judgment with ESP's own statement of disputed and undisputed material facts and additional materials in support of the ESP's opposition. Each party has filed responses to the other's statements of disputed and undisputed facts.

The parties have conferred with the Hearing Officer by telephone and email and concur that no further submissions or oral argument are required for disposition of CNSU's motion.

UNDISPUTED FACTS

Although the parties disagree as to certain facts, it appears that there is no genuine dispute as to the following facts:

1. In October of 2005, the student was placed in Vermont Department of Children and Families' ("DCF") custody. The student took up full-time residence with foster parents who reside in Lunenburg, Vermont, located within the Essex-Caledonia Supervisory Union ("ECSU"). As of October 2005, the student's residence was in Lunenburg and ECSU for educational purposes.

2. On January 10, 2006, the student was expelled from Lyndon Town School for making intentional physical contact with a teacher. The student's behavior was problematic and he was receiving failing grades at the time of his expulsion, but there was no discussion of eligibility for special education services.

3. On January 10, 2006, the student was diagnosed with emotional behavioral disturbance ("EBD").

4. On January 17, 2006, the student was classified as having oppositional defiant disorder, and anxiety disorder.

5. After being out of school for approximately two weeks, the student was enrolled at the Cornerstone School ("Cornerstone"), an alternative school for emotionally disturbed children, in St. Johnsbury, Vermont, by his DCF social worker.

6. The ESP was named the student.'s ESP on January 25, 2006.

7. The student spent two months at Cornerstone, during which his behavior was problematic. The student was also evaluated during this period and deemed eligible for special education services. An Individualized Educational Plan ("IEP") was written and scheduled to be implemented on March 27, 20-06.

8. On April 12, 2006, an IEP team meeting was held at DCF's office in St. Johnsbury to discuss the student's education, during which his therapist stated that given his disabilities, he

should be placed in an alternative school with a small contained building, small class sizes, and small classrooms.

9. On April 26, 2006, the student's IEP team met again at the DCF office in St. Johnsbury and decided unanimously to enroll him at the Lyndon Educational Alternative Resources Network, Inc. ("LEARN") in Lyndonville, Vermont, a small alternative school specializing in helping students with emotional and behavioral problems, which is certified by the State of Vermont. The student's IEP team also concluded that placing the student at available public schools, including Lyndon Institute, was not appropriate given his educational and behavioral needs.

10. It is not clear from the record exactly who enrolled the student at LEARN, but the student was enrolled at LEARN on April 27, 2006 and completed the 2005-2006 school year without major incident.

11. On June 1, 2006, the student's IEP team met to discuss the student's placement for the 2006-2007 school year. The IEP team considered the emotional, behavioral and educational progress the student made during his six weeks at LEARN, as well as LEARN's ability to addressthe student's emotional and behavioral difficulties, and decided that it would be in his best interest for him to return to LEARN for the 2006-2007 school year.

12. Beginning on August 27, 2006, as part of its parent/child reunification goal, DCF arranged for the student to spend four nights per week with his biological mother, in Lyndonville, and to remain at the foster parents in Lunenburg three nights per week. This move had the effect of changing the student's supervisory union from ECSU to CNSU, but remained in DCF custody and the foster parent remained as the student's Educational Surrogate Parent. The student was not disenrolled from LEARN, nor enrolled at any other school.

13. On August 18, 2006, CNSU convened an IEP team meeting to review the student's IEP. This meeting was attended by LEA Colleen Bancroft, Kate Campbell (Educational Director, LEARN), the parent, Emily Carrier (DCF Case Manager), the ESP, and Theresa Hamelette (NKHS). IDEA parental rights were offered and accepted at this meeting. The IEP team discussed the student's history, therapy, and anger management classes, as well as his progress at LEARN.

14. Also on August 18, 2006, LEA Colleen Bancroft forwarded a letter to the ESP offering halftime at LEARN and halftime at Lyndon Institute as the placement for the student leading up to fulltime attendance at the Lyndon Institute. The LEA advised that she would not place the student at LEARN on a fulltime basis.

15. On August 23, 2006, the student and his foster parents, including ESP, visited Lyndon Institute and met with Twilla Perry, Special Education Coordinator, and Eric Lucier, Counsellor. They toured a small yellow building used by Lyndon Institute for the "Yellow House Program," which, at least in the student's case, would include small group instruction and one-on-one counseling, a transition from LEARN to Lyndon institute, some regular classes, and separate study hall.

16. On August 28, 2006, another IEP team meeting was convened. LEA Bancroft offered the Yellow House Program for the student's placement.

17. Also on August 28, 2006, the LEA sent a letter to the ESP stating that the LEA was not willing to place the student at LEARN. That letter included a Notice of Educational Agency Decision effective August 29, 2006 and copy of the student's IEP dated August 29, 2006 (apparently due to clerical errors, some references to IEP team meetings or documents dated August 29, 2006 were intended to refer to the IEP team meeting held on August 28, 2006).

18. On or about August 30, 2006, the student began attending school for the 2006-2007 school year by attending LEARN in the mornings and Lyndon Institute in the afternoons.

19. On September 13, 2006, another IEP team meeting was held to discuss the student.'s IEP in the context of a full transition to Lyndon Institute. At that meeting, the ESP stated that she would be placing the student full time at LEARN and the ESP was informed that she would need to go through due process.

20. September 13, 2006, was the last day that the student attended Lyndon Institute; after that date the student attended only LEARN.

21. On September 14, 2006, ESP instructed LEARN not to send the student to Lyndon Institute.

22. On September 27, 2006, ESP received a letter from LEA Bancroft inquiring as to the student's placement as he had not attended his placement at Lyndon Institute for several weeks. This correspondence again included a copy of the student's IEP dated August 29, 2006. This letter further noted that the ESP had last met with the student's team at Lyndon Institute on September 13, 2006 and that she had then refused the IEP that was offered. The letter further noted that the LEA had not received any notice of a due process complaint and that placement by the ESP of the student at LEARN would not be paid for by CNSU. The LEA further offered to talk about available educational placements. Copies of the letter were sent to the student's biological mother, the DCF Case Manager and the Department of Education Educational Surrogate Program Director.

23. On September 29, 2006, ESP mailed a certified letter to LEA Bancroft requesting formal notice explaining LEA Bancroft's decision to remove the student from LEARN and place him at Lyndon Institute.

24. On October 3, 2006, ESP sent a letter to CNSU informing CNSU of her placement of the student at Project LEARN.

25. On October 13, 2006, ESP received an envelope postmarked October 10, 2006, with enclosed notice of Local Educational Agency decision (Form 7), and acknowledging that she had been informed by CNSU that it would not pay for the student.'s placement at LEARN.

26. On October 18, 2006, the LEA again wrote to the ESP inviting the ESP to contact her as soon as possible to set up a meeting to discuss the student.'s placement. The letter was copied to the DCF Case Manager and the Director of the Educational Surrogate Program.

27. On November 14, 2006, the LEA again wrote to the ESP, stating: "On both September 27th and October 18th I wrote to you a letters [sic] regarding the student's IEP, and I voiced my concern regarding his unilateral placement at LEARN. I would still like the opportunity to work with you and the student in offering him a free and an appropriate public education, as of this date you have not responded to either of my requests for a meeting. In the interim, I have heard from Diane Janukajtis that you are once again threatening a due process complaint. I feel that perhaps it may be time to involve an outside mediator with respect to this concern, and therefore I am writing a letter to the State Department of Education requesting a mediation meeting (see attached). It is my hope that we can work together in order to provide the student with an appropriate education."

28. Also on November 14, 2006, the LEA wrote separately to the Department of Education and requested mediation services between the LEA and the ESP. Copies of this letter were sent to the student's biological mother, the DCF Case Manager, and the Department of Education Educational Surrogate Program Director.

29. On November 21, 2006, the Department of Education wrote to the ESP, with copy to the LEA, offering mediation services.

30. On March 2, 2007, the due process complaint was filed.

DISCUSSION

Although the parties' submissions raise various disputes as to statements made or not made by various parties at various times, the affidavits and undisputed statements of fact tell the story of a young man who did not fare well in his pre-IEP school experiences at the Lyndon Town School and in the Cornerstone Program. Once he was found IEP eligible and placed at LEARN, his behavior and academic performance began to improve during the six weeks he attended LEARN from April 2006 to the end of the 2005-2006 school year.

Following his relocation to CNSU in August, 2006, IEP meetings in August and September 2006, and correspondence from the LEA to the ESP through November 2006, it was clear that CNSU would not place the student at LEARN on a continuing basis or pay for him to attend LEARN.

It is not clear from the record whether the "Yellow House Building" toured by the ESP would continue to be used for the "Yellow House Program" offered by CNSU, whether the Yellow House Program would be moved to another location, or whether the Yellow House Program would be effectuated at all. It is not clear whether the program offered by CNSU could meet the student's needs or whether the offered program constituted a free and appropriate public education.

There are also unanswered questions as to the extent of consensus among members of the student's IEP team, the extent to which the LEA considered the opinions of various members of the IEP team, and the reasons behind CNSU's blanket policy of not placing students at LEARN.

The answers to these questions are important on many levels, but they are not relevant to the disposition of CNSU's motion.

The parties recognize in their memoranda that summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c).

The parties also recognize that the statute of limitations on due process complaints in unilateral placement cases is 90 days. V.R.C. 2365.1.6.1(a)2.

Based on the record, it is clear that the LEA made a placement proposal and no later than October 3, 2006, the ESP, whether for sound reasons or not, had decided not to accept the LEA's proposal. The ESP (or DCF) had also decided by then that the student would attend LEARN. It is also clear that more than 90 days elapsed from that time to the filing of a due process complaint on March 2, 2007.

The issue, for purposes of this order, is not whether LEARN is the best environment for the student, or even whether CNSU offered a FAPE, but whether the ESP filed the due process complaint within 90 days from the date of a unilateral placement.

THE UNILATERAL PLACEMENT ISSUE

If a unilateral placement occurred, the 90 day statute of limitations expired prior to filing of the due process complaint. The ESP argues that a unilateral placement did not occur for several reasons.

First, the ESP argues that DCF had custody, an Educational Surrogate Parent does not have legal custody, and therefore the ESP could not have effectuated the unilateral placement in this case.

The ESP further argues that no "placement" occurred because the student's last agreed-upon IEP, dated March 27, 2006, updated April 26, 2006 and June 1, 2006, placed the student at LEARN.

The ESP also argues that the IEP team meetings held by CNSU in August and September of 2006 never resulted in an agreement as to an appropriate placement. Whether supported by IEP team members or not, the LEA made a proposal on August 28, 2006, which the ESP rejected. When an IEP team cannot agree, "the LEA shall determine the contents of the IEP…and shall notify the parents of their rights to seek mediation, file an administrative complaint or request a due process hearing." V.S.E.R. 2363.4(d).

It is clear from the record that the LEA made an offer that was rejected by the ESP and that the ESP unilaterally decided to continue the student's education at LEARN rather than in accordance with the LEA's proposal.

The fact that the student's placement was also at LEARN prior to his move to CNSU does not change the fact that it was incumbent on CNSU to begin IEP team meetings and the development of an IEP, which it did. The outcome, although perhaps not based on any team consensus, was a proposal that the ESP found unacceptable. The ESP (or DCF) unilaterally chose to implement a different course of action and received notice of her rights to pursue due process to seek reimbursement.

The ESP's argument that she could not have effectuated a unilateral placement because she did not have legal authority to enroll the student at LEARN is not persuasive. As the ESP

points out in her memoranda, the relevant bundle of legal parental rights with respect to the student's enrollment in any educational program appears to be divided between DCF (through the assigned social worker) and the ESP.

There has been discussion of the role of DCF Policy 151, but the legal effect of that policy is likewise not relevant here. Both DCF and the ESP were on notice of CNSU's proposal for an IEP. If they felt that CNSU's proposal did not constitute a FAPE, a due process complaint could have been filed within the 90 day statute of limitations.

The next question is whether there is any basis to conclude that the 90 day statute of limitations should be extended in this case on equitable or other grounds.

It appears that both DCF and the ESP were given notice of parental rights on at least two occasions by CNSU in August and September, 2006. It also appears that both DCF and the ESP were notified by letters from LEA Bancroft that CNSU would not voluntarily reimburse for attendance at LEARN, that CNSU was open to further discussions regarding an appropriate program, and that CNSU requested mediation.

One can infer that the ESP was unhappy with the LEA over numerous issues, including questions about use or nonuse of the Yellow Building and the viability of the Yellow Building Program, about CNSU's understanding of and ability to meaningfully address the student's needs, about the LEA's receptiveness to opinions of IEP team members, and about CNSU's blanket policy prohibiting placements at LEARN. Nevertheless, the ESP and DCF were made fully aware of CNSU's position and of their rights to pursue due process. No reasonable explanation has been given as to why the ESP waited until March 2, 2007 to file a complaint.

Based on the undisputed facts in this case, CNSU had the responsibility to develop an IEP. IEP team meetings were held in August and September 2006. The LEA made a proposal

no later than September 2006, which was rejected by the ESP with DCF's knowledge. The student was placed in a program other than that offered by the LEA, with the knowledge of both DCF and the ESP. No party other than the ESP or DCF had the right to initiate due process. Neither the ESP nor DCF initiated due process until March 2, 2007, after the 90 day statute of limitations had expired.

Accordingly, the ESP's complaint for due process is hereby dismissed.

NOTICE OF APPEAL RIGHTS

Pursuant to Vermont Department of Education Rule 2365.1.8:

"(a) The decision of a hearing officer is final unless appealed to a state or federal court of competent jurisdiction.

(b) Parties have right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction. An appeal from a due process hearing decision to a court of competent jurisdiction pursuant to 20 U.S.C. §1415(i)(2) and (3)(A), 1415(l) shall be commenced within 90 days from the notice of the final decision, and not after."

Dated at Middlebury, Vermont, this 29th day of May, 2007.

_____/s/_____
Donald R. Powers, Esquire
Hearing Officer
48 Court Street, Middlebury, VT 05753